

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE)	12-MDL-2323-AB
PLAYERS' CONCUSSION INJURY)	
LITIGATION)	
)	
)	
)	
KEVIN TURNER and SHAWN WOODEN,)	
on behalf of themselves and)	
others similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
NATIONAL FOOTBALL LEAGUE and)	
NFL PROPERTIES, LLC,)	
successor-in-interest to)	
NFL Properties, Inc.,)	Philadelphia, PA
)	May 2, 2018
Defendants.)	2:43:54 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE ANITA B. BRODY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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By Mr. Seeger

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By Ms. Buckley

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By Ms. Benedetto

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RULING BY THE COURT:PAGE

By Judge Brody

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1 (The following was held in open court at 2:43 p.m.)

2 MR. SCHEIDT: We're on now, Your Honor.

3 THE COURT: Mr. Seeger, it's your request for a
4 TRO.

5 MR. SEEGER: Right, Your Honor. Also with me, just
6 for the record, is Terri Benedetto from my office.

7 THE COURT: Okay.

8 MR. SEEGER: So, Your Honor, as you know -- as you
9 know, the Court had entered an Order dealing with funding
10 arrangements of the type that are being used by Thrivest in
11 this case. We believe, and I don't think there's any real
12 dispute by Mr. Buckley, that's Thrivest is subject to the
13 Court's Order making the finding that these agreements
14 violated the settlement agreement and that they're void, not
15 voidable, but void. The Court also offered a procedure where
16 if the lenders wanted to recover, you know, their -- their
17 principal, they could come in and sign a waiver agreement.
18 Thrivest in the case of -- and we may have to seal this later,
19 Your Honor, but I'll just put the argument out there. There's
20 a class member by the name of William White, --

21 THE COURT: Why don't we -- why don't we --

22 MR. SEEGER: -- who has received a monetary award --

23 THE COURT: -- well, can we -- one second. Let's
24 call him "W" here and -- and can we -- can we --

25 MR. SEEGER: Okay.

1 THE COURT: -- can I -- can I redact that in the
2 transcript? Well, go ahead with it.

3 MS. BENEDETTO: Your Honor, I believe -- I believe
4 Mr. Buckley filed something on Thrivest's behalf yesterday on
5 ACF that enclosed that particular class member we're talking
6 about's name.

7 THE COURT: Oh.

8 MS. BENEDETTO: So, it's already out there.

9 THE COURT: Oh, okay. All right. But, let's call
10 him "W" for the rest of the -- rest of the hearing. Okay. Go
11 on.

12 MR. SEEGER: Let's all play it safe here. So, all
13 right. So, we'll call him Mr. W.

14 THE COURT: Yes.

15 MR. SEEGER: He's a class member, who has received
16 an award for probably one of the most serious injuries covered
17 by the settlement which is ALS. As I said, Thrivest did not
18 sign the waiver and has chosen to take another path. They
19 filed an arbitration statement and -- and, you know, look,
20 they're just serious consequences here that I would like to
21 really cut to the chase on.

22 One is if -- if the arb -- if the arbitrator finds
23 in favor of Thrivest, not only will Mis -- Mr. W have to put
24 up \$750,000 that I can assure you he does not have, he's going
25 to stuck paying their attorney's fees, that's number -- number

1 one. What perhaps should be number one is the one thing you
2 cannot have in a class action or in a multi-district
3 litigation are attorneys attempting to do an end-around Court
4 Orders and that's what this is. This is an attempt to get
5 around your Order, Your -- Your Honor, and to haul Mr. W. into
6 a State Court Arbitration, hoping that he can get declaratory
7 relief, that you got it wrong, and force us --

8 THE COURT: (Recording malfunction).

9 MR. SEEGER: We think that under Rule 65 you can
10 clearly grant the TRO in this and ultimately, we'll seek
11 permanent injunction under the All Writs Act. If you -- when
12 -- when we have an opportunity to -- to spend more time on
13 this, if you look at the All Writs Act cases, they deal with
14 fact patterns almost identical -- identically analogous to
15 this where somebody is trying to frustrate the purpose of a
16 Federal Court Order in an MDL or a class action and go around
17 it and go into State Court or go through an arbitration
18 proceeding for the purpose of getting around a Court Order. I
19 just don't think that you can allow that to happen here.

20 The Court's ruled on this already. An alternative
21 was offered to Thrivest. They didn't take advantage of it.
22 Also, they were given opportunity to weigh on this -- weigh in
23 on this before Your Honor before -- after you had -- I believe
24 you gave them objector status before you had entered the Order
25 voiding the agreement with the lenders. And, then again, they

1 had an opportunity to weigh in on all this when you entered
2 the Order basically instructing Brown Greer to withhold these
3 payments. As far as I know at this point, I could be wrong
4 and Terri can correct me, I don't think that they filed
5 anything on that. And --

6 MS. BENEDETTO: Well, they did not appeal --

7 MR. SEEGER: -- now they're --

8 MS. BENEDETTO: -- as others had.

9 MR. SEEGER: -- (inaudible).

10 THE COURT: They did not appeal. Okay. And I
11 assume that the 30 day appeal period is -- has -- has
12 expired?

13 MS. BENEDETTO: It has.

14 THE COURT: Okay. All right. Let me hear from you,
15 Mr. Buckley.

16 MR. BUCKLEY: Thank you, Your Honor. Let me start
17 as a threshold and that is there's no jurisdiction here either
18 in the class action or for this TRO in the context of a class
19 action. The -- Thrivest is not a party to the NFL Concussion
20 litigation. It's not a party to the settlement agreement.
21 It's not encumbered by the ambit of the Court's authority and
22 jurisdiction under the settlement agreement. It's not
23 referenced in Section, I think it's 27.1, which talks about
24 the Court's continuing jurisdiction.

25 Moreover, not only does the Court lack jurisdiction

1 over Thrivest for those reasons, if Thrivest is a defendant
2 here, Thrivest has not been served with original process.
3 There is no complaint and, frankly, Mr. Seeger, as Class
4 Counsel, does not have standing to sue Thrivest. The --
5 indeed, the agreement that's at issue here, and that's a
6 fundamental agreement, you know, a fundamental issue. The
7 agreement between Thrivest and Mr. W. has not only an
8 arbitration clause which reserves the question of validity of
9 the agreement to an arbitrator, but it also has a class
10 action -- action and multi-district litigation waiver.

11 And the Supreme Court of the United States has
12 upheld both.

13 With respect to the arbitration clause, there's a
14 distinction between questions of formation that the Court may
15 have jurisdiction over, such as whether somebody had, you
16 know, understood the agreement that they were entering into,
17 or whether, you know, an agreement was actually reached and
18 questions as to validity of the entire agreement. And the
19 Rent-A-Center case makes clear that when you're arguing about
20 the validity of the entire agreement and not formation of the
21 arbitration agreement, that that's a separate question that
22 must be decided by the arbitrator.

23 In other words, unless you make a specific challenge
24 to the arbitration agreement, those issues are for the
25 arbitrator to decide. The issue of validity is for the

1 arbitrator to decide.

2 And to the extent that there's a question about Mr.
3 W's capacity to enter into this agreement, in other words did
4 he form an arbitration agreement, you know, I respectfully
5 disagree that he was, in any way, incapacitated. Mr. W.
6 had -- was diagnosed with ALS, which is not a -- which does
7 not, at least in its early stages, impact the individual's
8 mental capacity. And the -- this agreement was signed by his
9 neurologist who said he has capacity to enter into the
10 agreement and it was notarized by his attorney. In fact,
11 just last Wednesday --

12 THE COURT: Who was his attorney? Who was his a --
13 one second. Who was his attorney in this?

14 MR. BUCKLEY: Robert Wood, who is rep --
15 representing Mr. W. in the arbitration. And, indeed, Your
16 Honor, just last Wednesday, Mr. W. delivered an eloquent
17 invocation at the memorial service for former Ohio State
18 football coach, Earle Bruce and he was interviewed on T.V. by
19 the local news. And he appeared as --

20 THE COURT: This is irrel -- I don't care what --

21 MR. BUCKLEY: -- speakable --

22 THE COURT: -- I don't care what -- one second.

23 Let's -- let's not do this. That has noth -- that is
24 irrelevant to me. I don't care who interviewed whom. Let's
25 talk about the issues in this case. I'm listening to you; but

1 you're not going to be able to argue that. Go on.

2 MR. BUCKLEY: Okay. But, the issue, Your Honor, is
3 whether the agreement that Mr. W. and Thrivest entered was
4 valid. And that's an issue that Mis -- that -- that Mr.
5 Seeger has raised, but that Mr. W. has not raised. But, even
6 to the extent that that issue is properly before anyone, it's
7 an issue that Mr. W. and Thrivest specifically agree would be
8 decided by an arbitrator not by the Court. And, so, to the
9 extent that Your Honor's December 8 Order could be viewed as
10 impacting that question, it can't impact that question as to
11 parties that agreed to arbitrate disputes about the validity
12 of the agreement because the Supreme Court has said those
13 disputes are properly before an arbitrator.

14 THE COURT: I'm famil -- I'm familiar with the
15 arbitration law. Mr. Seeger, are you familiar with Mr.
16 Wood?

17 MR. SEEGER: I mean I met him by telephone after
18 Mr. Buckley filed the arbitration agreement, and I told him I
19 wanted to help. And he's authorized me to do so. I also --

20 THE COURT: Oh, well wait a minute. Let's get him on
21 the phone.

22 MR. SEEGER: -- (inaudible).

23 THE COURT: So, because Mr. Buckley you said that --
24 that -- that -- that Mr. Wood is opposed to this. Did you
25 not?

1 MR. BUCKLEY: No, I -- I think Mr. Wood is very much
2 in favor of anything that would allow his client to keep the
3 money that Thrivest paid to him in exchange for --

4 THE COURT: So, in other words, he's --

5 MR. BUCKLEY: -- PSFS (phonetic) distribution.

6 THE COURT: You didn't say that. Mr. Buckley,
7 that's not what was said to me. What was said to me is that
8 he approves of what you're doing and you may have made a
9 mistake; but, that's what you said. So, the answer is --

10 MR. BUCKLEY: Well, let me correct --

11 THE COURT: One second. Mr. Wood is -- is Mr.
12 Seeger correct that Mr. Wood approves of the position that Mr.
13 Seeger is taking; is that correct?

14 MR. BUCKLEY: That's my understanding, Your Honor.

15 THE COURT: All right. That's what I wanted to --

16 MR. BUCKLEY: What I had mentioned earlier -- what I
17 had mentioned earlier was that Attorney Wood was the same
18 attorney who was working with Mr. W. in December 2016 when Mr.
19 W. signed the agreements with Thrivest and, in fact, Mis --
20 Attorney Wood notarized those agreements --

21 THE COURT: Okay.

22 MR. BUCKLEY: -- and, also, signed an
23 acknowledgment.

24 THE COURT: All right. I understand your position.

25 MR. BUCKLEY: And that's what I was referring to.

1 THE COURT: All right. That's okay. Don't worry
2 about that.

3 MR. BUCKLEY: So, -- so, the other thing I wanted
4 to bring to the Court's attention was that yesterday, after
5 Attorney Wood had indicated that he objected to the
6 jurisdiction of the arbitrator, we filed a complaint to
7 compel arbitration in the Western District of Pennsylvania,
8 which is halfway between where we are and where Mr. Wood is
9 and where -- where Mr. Whi -- Mr. W. is, and that is docketed
10 in the Western District of Pennsylvania, but has not been
11 assigned a Judge.

12 THE COURT: Okay. All right.

13 MR. SEEGER: Your Honor, can I respond to a couple
14 of things?

15 THE COURT: Well, sure. First, --

16 MR. BUCKLEY: I -- I had -- I wanted to respond to a
17 few more things that Mr. Seeger --

18 MR. SEEGER: Sorry.

19 MR. BUCKLEY: -- had said.

20 MR. SEEGER: Okay. I'm sorry. I thought you were
21 done.

22 MR. BUCKLEY: This is not an end-run around the
23 Court's Order. The Court did not have jurisdiction to issue
24 Orders with respect to Thrivest's agreement with Mr. W. which
25 resolved -- or which reserved to an arbitrator exclusive

1 jurisdiction to determine the validity of the agreement
2 including any challenge to whether the entire agreement as a
3 whole is invalid due to the "no assignment of claims"
4 provision in the settlement agreement.

5 (Transcriber change)

6 MR. BUCKLEY: The -- indeed the no assignment of
7 claims provision has no application to the arbitration clause
8 in Mr. W's agreement with Thrivest and therefore it could not
9 possibly invalidate the arbitration agreement.

10 So, we're really dealing here not with the
11 substantive issue that Your Honor has opined on in the
12 December 8th Order, but with a jurisdictional issue and that
13 is who under Thrivest's agreement with White and the Supreme
14 Court's precedent under the FAA has the authority to determine
15 whether White's agreement -- whether W's agreement with
16 Thrivest is valid.

17 And, I submit to the Court that the Supreme Court is
18 clear that where the validity of the entire agreement is
19 challenged and where there is not a specific challenge as to
20 the agreement to arbitrate, that that challenge -- that that
21 dispute or that challenge or controversy regarding the
22 validity of the agreement must be resolved not by the Court,
23 but by an arbitrator --

24 THE COURT: All right. Okay.

25 MR. BUCKLEY: -- and, you know --

1 THE COURT: One second. One second. Let me just
2 ask you a few things. What is the -- what Court is the -- you
3 said it was -- there was a -- there's also a State Court
4 action. What Court was that brought in?

5 MR. BUCKLEY: There's no State Court action, Your
6 Honor. There is a -- a complaint to compel arbitration that
7 was filed yesterday in the Western District of Pennsylvania --

8 THE COURT: What's the --

9 MR. BUCKLEY: -- Federal Court.

10 THE COURT: What's the number of that case?

11 MR. BUCKLEY: I will look for it, Your Honor, as
12 we're talking here. I think that the way that the Western
13 District handles these things, they are initially filed under
14 a general docket and then assigned to a specific Judge.

15 I'm not sure if they give you a separate case number
16 then, but the case number that the case was assigned when it
17 was filed is 05-MC-02025, and I'd be happy to share a copy of
18 the complaint that we filed.

19 We still don't have a as-filed version because I
20 understand that the Western District is backed up. When last
21 we checked we were number seven in the queue.

22 THE COURT: Okay. All right. Mr. Seeger, would you
23 like to respond?

24 MR. SEEGER: Yeah, I'll be brief. I mean, the class
25 action waiver argument is a waste of time because we're not

1 suing Thrivest in a class action so I'm -- I'm not going to
2 spend -- and, I mean, maybe I will in the future but right now
3 that's not an issue.

4 As to the Court's jurisdiction, all the cases are
5 very, very straightforward on this, Supreme Court cases on
6 down. The settlement is a race which is before this Court,
7 Your Honor. You have the complete jurisdiction over it under
8 the -- under applicable law as well as the settlement
9 agreement, so to say that you have no jurisdiction to enforce
10 orders makes absolutely no sense.

11 You obviously do and the All Writs Act gives you
12 that power as well, the -- and you have the power to enjoin
13 all collateral litigation so there's -- there's really no
14 question on that.

15 I'm not really sure what's gained by the argument
16 about the arbitration provision because although Mr. Buckley
17 talks about this Rent-A-Car decision, there's also the Granite
18 Rock decision which is Supreme Court decision -- 561 US 287,
19 2010 decision which basically talks about how you frame this
20 issue.

21 So the bottom line here, without going through that
22 case and boring everybody on it, is you have -- you have
23 voided the entire agreement including his arbitration
24 provision. And you have the ability -- he could have --
25 Thrivest very simply could have taken the deal that was

1 offered in the Court's order.

2 They chose not to do that thinking clearly that they
3 could get around your order by running and arbitrating an
4 agreement that you have held void ab initio. So, I mean, I
5 think that we've clearly got the basis for a TRO and
6 ultimately we will for a permanent injunction against this
7 kind of activity. If others see this happen --

8 THE COURT: Well, as I read your papers --

9 MR. SEEGER: -- they're going to try to do the same
10 thing.

11 THE COURT: Mr. Seeger, I read -- I read your -- I
12 have read your submission and my understanding was that there
13 was something going on May 4th. Would you like to tell me
14 what that was? Was there any -- was there any --

15 MR. SEEGER: On May 4th --

16 THE COURT: Was there something before an
17 arbitrator? Or, Mr. Buckley? Forthrightness to the Court.

18 MR. BUCKLEY: Yes, Your Honor, I can address that.

19 THE COURT: What?

20 MR. BUCKLEY: Retired Judge Steven I. Platt in
21 Maryland has been assigned as the emergency arbitrator by
22 Triple A. He has scheduled an emergency hearing on Thrivest's
23 request that Mr. White escrow the disputed assets with
24 Attorney Wood until the merits of the arbitration are decided
25 and -- and the hearing on that is scheduled for this Friday at

1 1:00 p.m.

2 THE COURT: That's what I thought. Okay, that's
3 what your papers said, Mr. Seeger.

4 MR. BUCKLEY: Your Honor, I would --

5 THE COURT: Yes? Okay.

6 MR. BUCKLEY: Your Honor, I would like to address
7 Mr. Seeger's last comments about the Granite Rock case.

8 THE COURT: All right, look, let me tell you what
9 I'm going to do because I have a TRO in front of me and I
10 believe that my order has been -- that Trivest has
11 circumvented my order and I will grant the TRO in relation to
12 the arbitration because that's what I know has been -- has
13 actually been filed.

14 So there is an active TRO which has been granted
15 relating to the -- to the hearing that you're having on Friday
16 and it is enjoined from proceeding.

17 Mr. Seeger, that's what I'm doing as of today.
18 We're going to have a hearing on the one -- let's see, on May
19 -- May the -- if you can both make it, May the 9th at 11:00 in
20 the morning on this -- on my TRO because that's within ten
21 days, and I expect you both to be in Court unless both of you
22 cannot -- cannot make it at that time and then I'll do it the
23 following week or whenever else I can make it. What's your
24 schedules?

25 MR. SEEGER: Your Honor, this is for Seeger, I --

1 would it be possible to do it on the 10th or --

2 THE COURT: No --

3 MR. SEEGER: -- or maybe the day after that --

4 THE COURT: No, I can't do it. I'm going to be away
5 the 10th and the 11th --

6 MR. SEEGER: Okay.

7 THE COURT: -- so I can't do it.

8 MR. SEEGER: Okay. Okay.

9 THE COURT: And how about you, Mr. Buckley, can you
10 do it at that time?

11 MR. BUCKLEY: I can be there on the 9th, Your Honor.
12 I still have issues about whether -- who's my opposing party
13 and what case I'm in.

14 THE COURT: You're in -- you're in my case -- you're
15 in my case and you are enjoined from continuing with
16 arbitration and your client is enjoined. Now, if you don't
17 like that I guess there's only one remedy, but that is my --
18 the Order of the this Court.

19 So there's no question about it, that is the Order
20 of this Court. You are enjoined to proceed and the
21 arbitration is enjoined from proceeding. So I am having a
22 hearing on Wednesday, May the 9th at 11:00 in the morning and
23 I will hear from both sides at that time.

24 MR. BUCKLEY: Your Honor, may I ask a question?

25 THE COURT: That depends what it is.

Ruling by the Court

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1 MR. BUCKLEY: Has --

2 THE COURT: You can ask a question.

3 MR. BUCKLEY: Has Your Honor ruled on Mr. -- has
4 Your Honor ruled on Mr. Seeger's motion to withhold to which
5 we filed an objection?

6 THE COURT: Motion to -- I don't know about that. I
7 don't know --

8 MS. BENEDETTO: Well, our position, Your Honor, is
9 that that was -- that was mooted by Your Honor's December 8th
10 Order as to --

11 THE COURT: I don't -- I don't know about that.

12 MS. BENEDETTO: -- as to the third-party funders.

13 THE COURT: All right, I don't know that. All I
14 know is if you need a further Order of the Court, Mr. Seeger,
15 you're going to have to request it. I don't know. Right now
16 I am ruling on your request for a temporary restraining order,
17 and it's granted, okay?

18 MR. BUCKLEY: Will you be issuing an Order, Your
19 Honor?

20 THE COURT: It's an Order of the Court, right this
21 minute. Is it going to be a --

22 MR. BUCKLEY: So you're not going to be issuing a
23 separate --

24 THE COURT: It is an Order of the Court. It is an
25 Order of the Court and you are a member of this bar and you

1 are bound by this Order of the Court, Mr. Buckley.

2 And when I get to -- to issue a written Order, it
3 will say that the request for an injunction to enjoin the
4 arbitration is granted -- temporarily enjoin the TR -- we're
5 granting -- the TRO is granted. That's what it will say, so
6 I'm not signing the Order that Mr. Seeger proposed because
7 it's too -- it goes too far. Right now I am enjoining the
8 arbitration, okay? Did you understand that Order, Mr.
9 Buckley?

10 MR. BUCKLEY: I do, Your Honor.

11 THE COURT: Okay. All right, thank you very much --

12 MR. SEEGER: Thank you, Your Honor.

13 THE COURT: -- and we will see you on the 9th. Bye.

14 MS. BENEDETTO: Thank you.

15 (Matter concluded, 3:05 p.m.)

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C E R T I F I C A T I O N

We, Lisa Wilson and Diane Gallagher, court
approved transcribers, certify that the foregoing is a correct
transcript from the official electronic sound recording of the
proceedings in the above-entitled matter.

LISA WILSON

DIANE GALLAGHER

DATE

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